Regulatory Guidance Letter 88-08
SUBJECT: Regulation of Artificial Islands, Installations, and Structures on the U.S. Outer Continental Shelf
DATE: July 20, 1988
EXPIRES: December 31, 1990

In recent months, certain developers have inquired whether they could establish gambling casinos and related facilities on structures located on the U.S. OCS without Corps of Engineers permits. As our regulations state at 33 CFR Sections 320.2(b)and 322.3(b), artificial islands, installations, structures, and comparable devices on the OCS require Corps permits under Section 10 of the divers and Harbors Act of 1899, as extended by Section 4(f) of the Outer Continental Shelf Lands Act (OCSLA). The legislative history of the OCSLA, as amended, indicates that Congress intended the Corps to regulate all such artificial islands, structures, etc., regardless of the purpose they would serve.

When a permit application is filed for such a structure on the OCS, the District Engineer should process the application essentially in the same manner as other Section 10 applications, under the Corps public interest review 33 CFR Part 320). The OCSLA also extends certain of the related laws listed at 33 CFR Section 320.3 beyond the U.S. territorial sea, which currently extends 3 nautical miles from the baseline. Therefore, the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act (FWCA), the Endangered Species Act(ESA) and the Marine Protection, Research and Sanctuaries Act(MPRSA) are extended to the OCS by the OCSLA, and when applicable, the District Engineer should apply the requirements of these laws to OCS permit cases.

Sections 401 and 404 of the Clean Water Act(CWA) (16 U.S.C. Sec. 1341 and 1344) are limited by definition to the three-mile belt and thus do not apply to the OCS. On the other hand, Section 402 of the CWA is specifically extended to the OCS by the terms of Section 403. Applicants for Section 10 permits should be instructed to apply to the EPA for Section 402 permits where 402 discharges are anticipated.

Section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c)(3)(A), states in relevant part,

> "any applicant for a required Federal license or permit to conductan activity affecting land or water uses in the coastal zone of that stateshall provide . . . a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification . . . no license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification. . . ."

Language by the Supreme Court in Secretary of the Interior v. California, 104 S.Ct. 656, 663 (1984), raises some doubt regarding state CZMA 307(c)(3)(A) authority seaward of the three-mile limit; on the other hand, in Exxon v. Fischer, 807 F.2d. 842, 844 (1987),

the 9th Circuit stated that CZMA Section 307(c)(3) does apply to federally permitted activities on the OCS. In any event, unless and until the Supreme Court clarifies the law in this area, the District Engineer should follow the National Oceanic and Atmospheric Administration (NOAA) regulations implementing the CZMA for activities requiring a Federal permit or license. (15 C.F.R. 930.5)

The NOAA CZMA regulations require state consistency determination for all applications for activities included on the affected state's approved CZM program "list of Federal license and permit activities which can be reasonably expected to affect the coastal zone." (15 C.F.R. 930.53) The District Engineer should consult the affected state's approved list to determine whether (a) it includes structures or artificial islands on the OCS not intended to explore for, develop or produce oil or gas; and (b) it generally describes the geographical location of such structures. If the Section 10 permit applicant's structures are included, the applicant must provide the state with a certification of consistency under CZMA Section 307(c)(3)(A) and the state must concur with the certification before the permit can be issued. However, if such structures are not included on the affected state's approved list, no such certification need be provided to the state and no state concurrence is required. (This regulation does not apply to structures intended for the exploration, development or production of oil or gas. Such structures are covered by 15 C.F.R. 930.7. Furthermore, 15 C.F.R. 930.5 does not apply to Federal activities uo the OOC, which are cvoered under OCMA Section 307(c)(1) even if they require a Corps permit. 15 C.F.R. 930.52 specifically states that Federal agencies applying for Federal permits are not "applicants" under 15 C.F.R. 930.5 but are subject to 15 C.F.R. 930.3 instead.)

The other laws listed in 33 C.F.R. 320.3, such as the National Historic Preservation Act, may not apply to structures on the OCS. Nevertheless, as a matter of policy the District Engineer should comply with the requirements of these laws to the maximum extent practicable, fur the purpose of arriving at a well informed decision based on the full range of public interest factors.

Finally, when the District Engineer receives a permit application for a structure on the OCS he should send a copy o the public notice to Department of the Navy, Office of JAG (OP-09J), Pentagon, Rm. 2D343, Arlington, VA 20350-1000, and Director of Oceans Law and Policy, U.S. Department of State (OES/OLP), Rm. 5805A, Washington, D.C. 20520, seeking their comments on the application.

This guidance expires 31 December 1990 unless sooner revised or rescinded.